



# Training Key® #600

## Eyewitness Identification

Recent research findings have prompted development of new guidelines and protocols for using eyewitness identification—whether it be through photo arrays, showups, or lineups.

## Background

Although the evidence provided by eyewitnesses can be tremendously helpful in the development of leads, identifying criminals, and exonerating the innocent—it is subject to error. Civilian eyewitnesses frequently prove to be unreliable observers, and erroneous identifications are sometimes the result. Misidentifications by eyewitnesses are normally the result of a combination of factors.

For example, human perception tends to be inaccurate, especially under stress. The average citizen, untrained in observation and placed under extreme stress as a victim of or witness to a crime, may not be able to describe a perpetrator accurately, sometimes even after coming face-to-face with the individual.

Also, a witness, particularly one who is not really sure what the perpetrator actually looked like, may be easily influenced by suggestions conveyed to him or her during the identification process. In *United States v. Wade*, the Supreme Court of the United States recognized these facts in saying:

*The influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor. Perhaps it is responsible for more such errors than all other factors combined.<sup>1</sup>*

Law enforcement officers may unwittingly facilitate misidentifications by using suggestive words or engaging in certain types of suggestive behavior. The average witness, anxious to make an identification and influenced by the police officer's image as an authority figure, can be very sensitive to any suggestion made by the police regarding the identity of the perpetrator. Officers may, totally unintentionally, convey

to the witness by word or behavioral cue, that a particular person being viewed is the suspect.

Consequently, great care must be taken by officers conducting any type of eyewitness identification to avoid any action that might lead to an erroneous identification. Scrupulously adhering to the procedures and precautions outlined in this document will help avoid misidentifications that may lead to unjust accusations or even erroneous convictions of innocent persons and divert the investigation away from the real culprit. In addition, even if the actual perpetrator is caught and brought to trial, using improper identification procedures during the investigation will often cause the suppression of identification evidence at trial, resulting in dismissal of the charges or otherwise making it impossible to convict the guilty party.

It is estimated that some 77,000 people nationwide are put on trial because eyewitnesses pick them out of lineups or photo arrays. Recently, changes in eyewitness identification procedures have been spurred by the fact that nearly 200 people have been cleared of crimes through DNA evidence, most of which were convicted based on eyewitness identification.<sup>2</sup>

Research in this field has provided much information on the dynamics of eyewitness identification. For example, the manner in which suspects are presented to witnesses has bearing on whether identification will be made and which individual is more likely to be pinpointed by the witness. In the wake of these and many other research findings, the American Bar Association (ABA) issued a resolution containing *Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* in August 2004. The document has subsequently prompted states such as Wisconsin and California to conduct similar reviews of eyewitness identification practices and to issue recommendations for change in their respective

jurisdictions that generally mirror the ABA suggestions.<sup>3</sup> No doubt, these findings will continue to influence reforms around the nation. Officers may find that these best practices may also be cited during court proceedings as models for conducting eyewitness identification.

If a court determines that an identification procedure was excessively suggestive, the court may prohibit introduction of the evidence in question. It may rule that any in-court identification of the accused by the victim is inadmissible or suppress other evidence that was obtained as a result of an improper pretrial identification procedure or both. Of course, any of these actions may be fatal to a case.

Today, in evaluating proper identification procedure, the courts will generally be concerned with whether it was suggestive. If the court finds that the procedure was suggestive, the court will then proceed to determine whether, despite the suggestiveness, the identification was reliable when considering the totality of the circumstances.<sup>4</sup>

For purposes of this document, identification procedures may be categorized as showups, lineups, or photo arrays. In a lineup, eyewitnesses are presented with a number of individuals. By contrast, in a showup, witnesses are shown one suspect only. Photo array procedures generally involve showing several photographs to a witness for the purpose of obtaining identification.

## Showups

The showup has been widely condemned by the courts and by experts in law, law enforcement, and law enforcement identification procedures.<sup>5</sup> While the courts have not held showups to be categorically improper, they have ruled that the determination of whether a specific showup was excessively suggestive will be made based upon the totality of the circumstances attending that particular showup. In practice, evidence deriving from showups is frequently suppressed because the showup is so inherently suggestive. Consequently, the use of showups should be avoided where possible, particularly when photo arrays or lineups could be used.

It is recognized however, that a showup may provide sufficient probable cause early in an investigation that will help avoid the escape of a prime suspect as well as facilitate the release an innocent person and thus redirect police investigations in potentially more productive areas. Therefore, where use of a showup seems reasonable and appropriate, certain guidelines should be followed to minimize the suggestiveness of the procedure and the risk of suppression of any resultant identification evidence.

Showups conducted in the station house or jail are the most unreliable and hence the most objectionable. Showups should, whenever reasonably possible, conform with the following guidelines:

- Showups should not be used when independent probable cause exists to arrest a suspect.
- Prior to the showup, the witness should provide officers with as complete a description of the suspect as possible.
- When possible, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.
- Showups should not be conducted when the suspect is in a cell, handcuffed, or dressed in jail clothing.

- Showups should not be conducted with more than one witness present at a time. If showups are conducted separately for multiple witnesses, the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect.

- The same suspect should not be presented to the same witness more than once.

- Showup suspects should not be required to put on clothing worn by the perpetrator, speak words uttered by the perpetrator, or perform other actions mimicking those of the perpetrator.<sup>6</sup>

- Words or conduct by the police that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided. For example, one should never tell the witness that the individual was apprehended near the crime scene, that the evidence points to the individual as the perpetrator or that other witnesses have identified the individual as the perpetrator. Unfortunately, the mere fact that the individual has been presented to the witness for identification strongly suggests that the officers believe him to be the guilty party.

- Following the showup, ask the witness how confident he or she is in the identification.

- Before showing the suspect, the following statement should be read to the witness. (Note: The same statement, with minor adjustments for context, should be made prior to using photo arrays or lineups). The statement should include the following:

*In a moment I am going to ask you to view (a person) (a series of photos) (a series of individuals).*

*It is just as important to clear innocent persons from suspicion as to identify guilty parties.*

*[In the case of lineups and photo arrays say that]: Individual(s) present in the (lineup) (photo array) may not appear exactly as they did on the date of the incident because features such as head hair and facial hair are subject to change.*

*The person who committed the crime may or may not be present in the group of individuals.*

*You do not have to identify anyone.*

*Regardless of whether you make an identification, we will continue to investigate the incident.*

*Do you understand these instructions?*

## Lineups

The lineup, if properly conducted, is significantly less suggestive than the showup and hence is generally preferable. Nevertheless, police officers conducting a lineup must also use caution to avoid suggestive influences. Studies of witness psychology reveal that lineup witnesses tend to believe that the guilty party must be one of the individuals in the lineup. Consequently, witnesses tend to pick out the person in the lineup who most closely resembles their perception of the perpetrator, even though the perpetrator may not in fact be

present.

Instructions—similar to those given to a witness prior to a showup—can facilitate an identification and avoid misidentification based on the witness's memory. The witness should be told that he or she is about to view a group of individuals who may have committed the crime. Before making any identification, the witness should be told that the individuals present in the lineup may not appear as they did on the date of the incident due to changes in features, such as head and facial hair or scars. The witness should also be told that the suspect may or may not be in the lineup; and that a positive identification is therefore not mandatory. The witness should be informed that whether or not an identification is made, the investigation will continue. Where two or more witnesses are involved, they should view the lineup separately and should not be allowed to discuss the lineup until all have completed the process.

Many witnesses, in an effort to please the police officers conducting the lineup, feel obligated to pick out someone from the lineup rather than disappoint the officers.<sup>7</sup> Such witnesses are often sensitive to, and strongly influenced by, subtle clues conveyed by the officers that may indicate to the witness that the officer believes that a particular individual in the lineup is the perpetrator. This makes it doubly important that officers conduct the lineup—and conduct themselves—in a nonsuggestive manner. To prevent these suggestive techniques and avoid any tip offs about the suspect's identity, police lineups should be administered by an officer who does not know which person in the lineup is the actual suspect.

Additionally, it has been recommended in the studies cited by the ABA and others that a lineup should be administered sequentially rather than all at once (simultaneously). When witnesses view photos or lineups simultaneously, they tend to make comparative judgments; they try to determine which of those persons present appears to make the best fit to their memory of the suspect. When the suspect is present in the lineup or photo array, they will likely be identified in this manner and no harm is caused. But, if the actual suspect is not present, witnesses still tend to make an identification based on the best fit among those present. This can lead to misidentification. Therefore, studies suggest that sequential presentation of suspects in both photo arrays and lineups is the better approach because witnesses tend to make absolute rather than comparative judgments when viewing suspects individually. In this process, suspects and fillers are presented one at a time and then move out of site as the next person is brought into view.

Preparing for a lineup may be as important to the validity of the procedure as actually conducting it. Selecting individuals as fillers for the lineup is a particularly important issue. In determining which fillers should be presented to the witnesses in a lineup, the following principles should be observed:

1. The lineup should consist of individuals of similar physical characteristics. Witnesses tend to pick out anyone who stands out from the rest of the group in any significant way. Therefore, the individuals who appear in the lineup should be reasonably similar with respect to age; height; weight; hair color, length and style; facial hair, clothing; and other characteristics such as glasses or visible tattoos. Of course, the individuals must be of the same race and sex. Absolute uniformity of the lineup participants is obviously unattainable and is not procedurally necessary.<sup>8</sup> However, lineups should avoid using

fillers who so closely resemble the suspect that the witness cannot correctly identify the actual suspect.

2. The lineup should consist of at least five or six persons. The smaller the lineup, the less objective it is. A lineup with only two or three persons is little better than a showup, and suggestive factors become excessively influential. In addition, some authorities caution against the use of plainclothes police officers in lineups because they do not naturally look or act like suspects, a factor that causes witnesses to reject them as possibilities. They also may have been seen by the witness in the community, upon visits to the police station, or in similar contexts.

Preparing a witness for viewing the lineup is another important consideration. Preparation should be limited to non-suggestive statements, such as explaining the procedure that will be used and making it clear that the individuals in the lineup will be unable to see the witness. Officers should avoid taking any action or making any statement that will adversely affect the validity of the lineup. In particular, before a lineup, officers should avoid:

1. Showing the witness any photos of the suspect.<sup>9</sup>
2. Conducting a showup with the suspect, or allowing the witness—accidentally or otherwise—to see the suspect, such as in an office or holding cell prior to the lineup.
3. Making suggestive statements to the witness, such as telling the witness that the person that is the suspect will be in the lineup. It is even desirable to tell the witness that the perpetrator may not be among those in the lineup. Other common errors that should be avoided include telling the witness that another witness has identified someone in the same lineup, advising the witness to take special notice of some particular individual in the lineup, or making any other statement or action which may cause the witness to focus on a particular individual, or to feel that the witness must pick out somebody.
4. Finally, if more than one witness is to view a lineup, the witnesses should be kept separated prior to the lineup and should not be permitted to discuss the case with each other, compare descriptions, etc.

5. In conducting the lineup, officers who are not assigned to that case should handle the procedure if possible. This helps to minimize the possibility that the officers who are conducting the investigation will in their zeal to solve the case, convey (inadvertently or otherwise) clues to the witness as to which person to pick out, or put pressure on the witness to pick out somebody. The following should also be observed in conducting lineups:

- *Statements that put pressure on the witness to make an identification should be avoided.* Witnesses are anxious to please the officers conducting the lineup, so they should not be made to feel that they are expected to pick out someone. For example, urging a hesitant witness to make an identification or to try harder would be improper.
- *Statements that may cause the witness to focus on a particular individual should be avoided.* The same sort of statements discussed in regard to witness preparation should be avoided during actual conduct of the lineup. Officers are often tempted to prompt a witness when someone in the lineup is a prime suspect and the witness is hesitant to make an identification.
- *The lineup should be presented to one witness at a time.* The common practice of having a group of witnesses view a lineup simultaneously should not be permitted. Courts,

including the U.S. Supreme Court,<sup>10</sup> have disapproved multiple-witness lineups. If for some reason, more than one witness must be present simultaneously, witnesses should be required to make their identifications silently, in writing, and should not be permitted to discuss the identification aloud with each other or with the officers present.

- *If possible, conduct a blank lineup.* Conducting two or more lineups, where one lineup includes the suspect and the others do not, assists the prosecution in later refuting any claim by the defense that the lineup was too small or was suggestive.

- *If multiple lineups are to be conducted for the same witnesses, do not put the suspect in more than one.* Seeing the same face in a second lineup may cause the witness to erroneously recognize the person as the perpetrator, merely because the face is familiar from the first lineup. Because of this, the courts have disapproved this practice.<sup>11</sup>

6. Videotape and audiotape the lineup whenever possible. This procedure provides a historical record of the proceeding should the identification or the process used come into question, or the actual identification process is necessary to assist the prosecution at trial.

In another context the Court has held that requiring a suspect participating in a lineup to speak, even to the extent of uttering the same words used by the criminal does not violate the Fifth Amendment, since it is not “testimonial self-incrimination.” Other actions, such as standing, walking, gesturing, and the like are similarly not self-incriminating within the meaning of the Fifth Amendment. Similarly, requiring the suspect to wear certain clothing has been held to be outside of the coverage of the Fifth Amendment.

Following the lineup, certain precautions should be taken. For example, where more than one witness has viewed a lineup, witnesses should be kept separate after the lineup procedure has been completed. While discussions between witnesses following a lineup will presumably not render any previously made identification invalid, it may affect the admissibility of a subsequent in-court identification of the defendant by these witnesses during the trial itself.

Additionally, witnesses should not be praised or congratulated for picking out the suspect. This may serve to reinforce a shaky identification, convincing the witness that he or she has picked out the actual perpetrator when the witness actually has doubt. In addition to increasing the chances of a miscarriage of justice, this may lead to suppression of a later in-court identification of the perpetrator by the same witness.

## Photo Identifications

Photographic identifications may take a number of forms. If a single photo is shown to the witness, the photo identification has all of the vices of the showup and is generally regarded by the courts as improper. Consequently, multiple-photo arrays are preferable. In such procedures, the photos may be shown individually, one at a time, or may be displayed simultaneously on a card. This procedure is similar to a lineup, and virtually all of the cautions set forth for lineups in the preceding discussion apply to multiple-photo identification procedures as well.

Specifically, the following recommendations are made regarding photographic identifications presented simultaneously or sequentially:

- There should be at least six photographs.

- The photographs should be of people who are reasonably uniform in age; height; weight and general appearance; and of the same sex and race. If scars or tattoos were present on the suspect, all in the photo array should be similarly marked or the area of the body should be covered for all.

- The photographs themselves should be similar. For example, color photographs and black and white photographs should not be mixed; they should be of approximately the same size and composition.

- Mug shots should not be mixed with snapshots since they are generally recognizable as such and have an immediate tendency to brand an individual.

- If mug shots are used, or if the photographs otherwise include any identifying information regarding the subject of the photograph, this information should be covered so that it cannot be seen by the witness. If only some of the photos have such information, the corresponding portions of photos should be covered so that none of the photos will look different.

- The array should not include more than one photo of the same suspect.

- The photo array should be shown to only one witness at a time.

- As with showups and lineups, no suggestive statements should be made. For example, witnesses should not be told that the suspect’s photo is in the group, or that someone else has already picked out one of the photos as being the criminal. Similarly, nothing should be said or done to direct the witness’s attention to any particular photograph. For example, pointing to a particular photo and saying, “Is this the guy?” is improper and may lead to suppression.

- As in the case of lineups, it is recommended by some that photo arrays be presented to the witness one at a time, then removed from view before the next photo is presented.

- The photo array should be preserved for future reference. In fact, in some states, failure to preserve the array will lead to suppression of the identification process. Additionally, as in lineups, full details about the identification process should be recorded and preserved—such as the administrator’s name; procedures used; date, time and location of the procedure; number of fillers, names of those present during the procedure; and whether the array was viewed more than once by the same witness. Assuming that the photo identification has been properly conducted and that the array itself was not in any way suggestive, preserving this information helps the prosecution refute any claims by the defense to the contrary.

The proper use of photographs to obtain identification of a perpetrator has been approved by the courts.<sup>12</sup> However, the courts appear to prefer that photographic identification procedures be used only to develop investigative leads. Some courts have criticized the practice of using photographic identifications once the suspect has been arrested, preferring that once the suspect is in custody and therefore readily available, a lineup be employed for eyewitness identifications.<sup>13</sup>

## The Right to Counsel at Eyewitness Identifications

In 1967, the U.S. Supreme Court held that a suspect has a right to counsel at a post-indictment lineup.<sup>14</sup> Subsequently, the Court expanded this ruling to provide for a right to counsel at any lineup conducted after formal adversary proceedings

have been initiated against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.<sup>15</sup> There is, however, no right to have counsel present at a lineup conducted before such adversary proceedings have been initiated. These same rules apply to showups. However, there is no right to counsel at photo identification sessions.<sup>16</sup>

The purpose of having counsel present at the identification is to enable counsel to detect any suggestiveness or other irregularities in the procedure. It should be recognized, however, that the presence-of-counsel requirement may actually help the police in certain instances. First, the department's goal should be to avoid any possibility of an erroneous identification and a resultant miscarriage of justice. Therefore, the presence of counsel may be regarded as a positive step in preventing any such occurrence. In addition, if counsel is present and acquiesces in the procedure being employed, this may preclude any subsequent defense contention that suggestiveness or other impropriety occurred. This will strengthen the prosecution's case. Therefore, to the extent that defense counsel is responsible and objective, cooperation with counsel in constructing and conducting a nonsuggestive and otherwise proper identification procedure may benefit to all concerned.

## Summary

Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

## Endnotes

<sup>1</sup> 388 U.S. 218, 229 (1967).

<sup>2</sup> Kate Zernike, "Study Fuels Debate Over Police Lineups," *The New York Times* (April 19, 2006).

<sup>3</sup> See: American Bar Association Criminal Justice Section, "Report to the House of Delegates on Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures," August 2004. Also: California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding Eyewitness Identification Procedures," released April 13, 2006. Also: State of Wisconsin, Office of the Attorney General, "Model Policy and Procedure for Eyewitness Identification," September 2005.

<sup>4</sup> This in turn is to be achieved by analyzing six factors. These are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation and (6) whether the witness was a casual observer or the victim of the crime. If in view of these various factors, it appears that the identification was reliable despite the suggestiveness of the procedure, evidence of the identification will be admissible to bolster a subsequent in-court identification. *Neil v. Biggers*, 409 U.S. 188 (1972). See also *Manson v. Brathwaite*, 432 U.S. 98 (1977). (*Biggers* test applied to photo identifications.)

<sup>5</sup> See *Stovall v. Denno*, 388 U.S. 293 (1967).

<sup>6</sup> Although such requirements sometimes may properly be imposed during a lineup, the showup is so inherently suggestive that the same court that would approve their use in a lineup may find them excessively suggestive when employed during a showup.

<sup>7</sup> Although it may surprise many officers to hear it, the average citizen still sees the police officer as a benevolent father figure (or perhaps, in the case of a female officer, a mother figure), with the result that the lineup witness is often extremely anxious to please the officer by making an identification—even though the citizen is not at all certain that the person chosen is the guilty party.

<sup>8</sup> *United States v. Lewis*, 547 F.2d 1030, 1035 (8th Cir. 1976).

<sup>9</sup> Even a photo array should be avoided. This is especially true if the suspect is the only person in the photo array who is also in the lineup.

<sup>10</sup> See *Gilbert v. California*, 388 U.S. 263 (1967).

<sup>11</sup> See *Foster v. California*, 394 U.S. 440 (1969).

<sup>12</sup> *Simmons v. United States*, 390 U.S. 377 (1968).

<sup>13</sup> It has been said that once a witness has identified a photo, this influences subsequent identifications. The contention is that the witness thereafter is really only recognizing the previously seen photograph, not the actual criminal. For this reason, the practice of showing a witness a photograph of the defendant just prior to trial to "refresh the witness's memory" should be avoided.

<sup>14</sup> *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967).

<sup>15</sup> *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

<sup>16</sup> *United States v. Ask*, 413 U.S. 300 (1973). At least one state supreme court has held that where simulated lineups are filmed or videotaped for later exhibition, there is no right to have counsel present when the film or videotape is subsequently shown to witnesses, *People v. Lawrence*, 481 P.2d 212 (1971). Showing witnesses a film or tape of a previously recorded simulated lineup has become known as a "Lawrence lineup."



## questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following statements is *false*?

- (a) *Improper identification procedures may result in suppression of eyewitness testimony at trial.*
- (b) *Some eyewitnesses are anxious to please or assist officers and may make identifications based on subtle suggestions or cues from officers during lineups or photo identification.*
- (c) *Showups should be used even when independent probable cause exists to arrest the suspect in question.*
- (d) *During showups, the witness should be taken to the location of the suspect rather than bringing the suspect to the witness.*

2. Which of the following statements is *false*?

- (a) *Showup suspects may be required to put on clothing or speak words uttered by the perpetrator.*
- (b) *Following a showup, the witness should be asked how confident he or she is in the identification.*
- (c) *Lineups are inherently less suggestive to witnesses than showups.*
- (d) *Lineups should be conducted by someone who does not know the identity of the suspect.*

3. Which of the following statements is *true*?

- (a) *A lineup should consist of at least five or six people.*
- (b) *Multiple witnesses to the same lineup should be kept separate from one another prior to and following the identification procedure.*
- (c) *Whenever possible, lineups should be presented to one witness at a time.*
- (d) *All of the above are true.*

## answers

- 1. (c) When independent probable cause exists, the suspect should be taken into custody without conducting a showup.
- 2. (a) During showups, suspects may not be required to put on clothing worn by or speak words uttered by the perpetrator as these could promote a misidentification.
- 3. (d) All of the statements are true.

## have you read . . . ?

*Training Key #596, Video and Audio Recoding of Interrogations and Confessions: An Update*, International Association of Chiefs of Police, Alexandria, Virginia 22314.

This document provides protocols for video and audio recording of custodial interviews, interrogations, and confessions. Wherever possible, video and audio recordings should also be used for recording lineups.